

Interim Policy for the Department of Energy's Use of Institutional Controls

Purpose

The purpose of this document is to state policy for the use of institutional controls at U.S. Department of Energy (DOE) facilities to protect human health and the environment during and after environmental restoration actions are taken to address releases of hazardous substances, including radionuclides.

Policy

It shall be the policy of the DOE to use institutional controls to supplement active remediation and pollution control measures for environmental restoration actions when it is not technically and/or economically feasible to remediate a site to unrestricted uses. DOE's Environmental Restoration Program Managers (ERPMS) shall select and implement institutional controls when necessary to ensure the short-term protectiveness of human health and the environment while cleanup actions are being conducted at sites. ERPMS shall ensure institutional controls are proposed and evaluated during the remedy selection process. ERPMS are responsible for ensuring that resources and personnel are available to implement, maintain and enforce institutional controls throughout their required period of performance unless these responsibilities are transferred to the site landlord and Program Secretarial Office (PSOs) in accordance with the Deputy Secretary's policy on *Long-Term Stewardship Transition to Site Landlord*.¹

More specific information on how this policy should be implemented is provided in guidance developed by DOE's Office of Environmental Policy and Guidance (OEPG), EH-41, available at: www.eh.doe.gov/oepa/ ("Guidance and Policy," section I).²

Definition

Institutional controls are mechanisms to prevent inappropriate uses of land, facilities, and environmental media and to prevent unacceptable human health and environmental exposure to residual contaminants that could pose risks above levels deemed protective. Institutional Controls within the ambit of this policy are: governmental controls, property controls and information devices.

¹ U.S. Department of Energy, Deputy Secretary of Energy, *Long-Term Stewardship Transition to Site Landlord*; December 15, 2000, Memorandum For All Departmental Elements; ES2000-026689.

² U.S. Department of Energy OEPG. *Institutional Controls in RCRA and CERCLA Response Actions at Department of Energy Facilities*; August 2000, DOE/EH-413-0004 and *The Long-Term Control of Property: Overview of Requirements in Orders DOE 5400.1 & DOE 5400.5*; October 1999, DOE/EH-412-0014/1099.

Governmental Controls: Those controls that are placed upon property under DOE custody and control that restrict use of land, facilities, and environmental media, in order to prevent access to residual contamination or in placed waste. Governmental controls remain subject to the requirements of Federal Property Management Regulations for inventorying, surveys, and inspection.³

Property Controls: Those controls implemented through property ownership documentation and are based on the retention of a subset of property rights by DOE. Property controls include: deed notifications, covenants, deed restrictions, easements, zoning, use restrictions, water right restrictions, digging/drilling restrictions, access restrictions, any related types of controls, and all enforcement mechanisms. Property controls remain subject to the requirements of Federal Property Management Regulations for inventorying, surveys, and inspection.⁴

Information Devices: Those are controls to inform or notify third parties that residual or capped contamination may remain on-site. Common examples include: signs and monuments, state registries of contaminated properties, deed notices, and advisories.

Background

Institutional controls, along with other long-term stewardship activities, are often necessary at many DOE sites due to the complexity of contaminants and site features associated with the containment of wastes on-site.⁵ Institutional controls may be appropriate to use when cleanup to unrestricted use is technically or economically impractical; remediation risks to worker health and safety are too high; or collateral ecological damage associated with cleanup actions would be too extensive. When selecting institutional controls as part of a remedy or as the sole remedy, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) regulations prescribe permanent cleanup solutions be used to the maximum extent practicable.⁶

³ Title 41 *Code of Federal Regulations*, Subtitle C, Chapter 101.

⁴ Title 41 *Code of Federal Regulations*, Subtitle C, Chapter 101.

⁵ Long-term stewardship includes those activities necessary to protect public health and the environment from residual hazards, including monitoring, maintenance, institutional controls, information management (including records maintenance), and other activities to ensure implemented remedies remain effective.

⁶ The CERCLA NCP states “institutional controls may be used during the conduct of the remedial investigation/feasibility (RI/FS) study and implementation of the remedial action where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of [the] remedy.”(40 CFR 300.430 (a)(iii)(D)). Although there are no promulgated RCRA corrective action regulations specifically addressing permissible uses of institutional controls, RCRA guidance issued by certain of EPA’s Regional offices frequently refers project managers to standards developed under the CERCLA program, suggesting that these EPA Regions hold CERCLA’s standards to be applicable to the RCRA program. For example, EPA Region V has issued guidance which specifies that institutional controls used as part of RCRA corrective actions should be evaluated against the nine remedy selection criteria in the National Contingency Plan (see U.S. Environmental Protection Agency, Region V Wastes, Pesticides and Toxics Division, Use of Institutional Controls in the RCRA Corrective Action Program, March, 2000). Site and project

managers should be aware that cleanups under RCRA are conducted in connection with the closure of regulated units and facility-wide corrective action either under a permit [RCRA sections 3004(u) and (v)], interim status order [RCRA section 3008(h)] or imminent hazard order [RCRA section 7003] or other authorities (i.e., legal mechanisms that are different from those used under CERCLA). Authorized states are the primary RCRA decision makers.

This policy and the implementing guidance focus on the selection and use of effective and protective institutional controls in situations where complete remediation of a site to unrestricted uses is not technically or economically feasible. As with all cleanup actions, institutional controls shall be evaluated in terms of the remedy selection criteria of CERCLA, NEPA, and/or RCRA and in accordance with DOE policy (e.g., to incorporate NEPA values into CERCLA response action decisions: *Secretarial Policy on the National Environmental Policy Act*, U.S. DOE June 1994).

Authority

This policy and the implementing guidance on institutional controls are not inconsistent with existing policies, regulations and guidance developed by the United States Environmental Protection Agency (EPA)⁷ and are issued pursuant to CERCLA (with lead agency authority by Executive Order 12580), RCRA, and the Atomic Energy Act (AEA).

Applicability

This policy applies to the selection and implementation of institutional controls that are part of environmental restoration decisions at all DOE-owned sites including property leased to third parties, properties with ongoing missions, and property that will be transferred to other federal or non-federal entities.

Policy Requirements

The following general requirements apply to all DOE sites relying on the use of institutional controls in final remedies. The implementing guidance developed by DOE's Office of Environmental Policy and Assistance, provides specific assistance in determining how these requirements should be implemented under various site and local conditions and situations.

⁷ U.S. Environmental Protection Agency. *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*; September 2000; OSWER 9355.0-74FS-P.

1. *Oversight and Enforceability.* DOE ERPMS shall ensure the methods for enforcing and overseeing institutional controls are in place and documented.⁸ If states, local governments, or other external entities will have a role in the oversight or enforcement of the institutional controls selected, ERPMS will undertake efforts to ensure that all parties involved are aware of and have documented their enforcement and oversight responsibilities. Furthermore, ERPMS shall seek concurrence and consultation from their local legal counsel and site Certified Real Property Specialists (CRPS) on any decisions involving institutional controls that include the lease or transfer of real property. If a site does not employ a CRPS, ERPMS shall consult with the headquarters' CRPS in the Office of Management and Administration. ERPMS shall ensure assessments and reviews of property controls are enforceable under federal property management regulations. Also, ERPMS will strive to mitigate land encroachments by maintaining active relationships with adjoining land owners and local governments and to ensure institutional controls are operating and functional for the period of time land use remains restricted.
2. *Documentation of Institutional Controls.* ERPMS shall ensure institutional controls are incorporated into a decision document with environmental regulators. Land transfer agreements will then be established between land transfer parties to clarify responsibilities. DOE shall not enter into final agreements involving the use of institutional controls unless the party(ies) responsible for maintaining institutional controls provide written assurance: 1) they will have the technical and financial abilities to maintain and enhance controls; 2) they are willing to abide by land use restrictions and controls; and 3) have or will attain legal authority for enforcement of the controls sufficient to protect human health and the environment.

At a minimum, supporting and decision documentation (e.g., CERCLA or NEPA Record of Decision or RCRA Statement of Basis) shall include: the reason the applicable or selected controls are needed; the human health and ecological exposure assumptions used to select the institutional controls; the specific restricted uses of the property beyond the basic land use categories, and an agency point of contact.
3. *Work with Regulators, Local Governments and Stakeholders.* DOE ERPMS shall seek regulator, local government and stakeholder involvement in the planning, selection, implementation, and enforcement of institutional controls.
4. *Evaluate Cost.* DOE ERPMS shall evaluate and document cost estimates for implementing institutional controls, including costs for their annual maintenance and enforcement over their required period of performance.

⁸ Documentation requirements must meet requirements of Quality Assurance DOE Order 414.1 A and/or the 40 CFR Chpt. 1, Subpart I, paragraph 300.800 for administrative record needs.

5. *Establish Procedures to Modify and Terminate Institutional Controls.* DOE ERPMs shall establish procedures to modify or terminate institutional controls when warranted by new information, technologies, or circumstances. ERPMs shall ensure their decision document and agreement are developed, amended, or modified, as necessary, to reflect changing conditions and ensure compliance with all public participation, administrative record and legal requirements.
6. *Ensure access to information about residual hazards.* DOE ERPMs shall establish and maintain a central database of the properties, sites, or areas of sites affected by institutional controls and shall ensure that this information is electronically linked to the Facility Information Management System (FIMS). ERPMs shall provide access to information for stakeholders and others. The database will include information on the types of controls established, monitoring and management requirements, parties responsible for enforcement, and the reporting procedures for non-compliance. When available, digitized maps shall be included to depict the areas affected by the institutional controls and provide any information necessary to enhance their effectiveness. The information media used will need to be periodically evaluated to ensure data remains available for review in the future.
7. *Maintain, Reevaluate and Improve Institutional Controls.* DOE ERPMs shall ensure periodic reviews and assessments are conducted as legally required by RCRA, CERCLA and the AEA to determine if institutional controls are effectively protecting human health and the environment given existing land uses and shall incorporate institutional controls into existing land use planning and management systems required under DOE O 430.1, Life Cycle Asset Management. The selection and implementation of more than one institutional control (e.g., layering or providing for redundancies in controls) can result in better protection of human health and the environment over long time frames they are expected to be enforced. The uncertainties associated with the use of institutional controls shall be managed through the use of contingency planning. ERPMs are responsible for ensuring that resources and personnel are available to implement, maintain and enforce institutional controls throughout their required period of performance unless these responsibilities are transferred to the site landlord and Program Secretarial Office (PSOs).